Supreme Court, U.S.
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No. 06-789

IN THE

Supreme Court of the United States

ROGE.. DRACH,

Petitioner,

v.

LOUIS BRUCE AND THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), apply retroactively to cases on collateral review?

2. Did the admission of statements by volunteers and workers at a women's crisis center—whose testimony provided evidence of a discordant marital relationship between petitioner and the victim—violate the Confrontation Clause under the now-abandoned standard of *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004)?

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STATEMENT OF THE CASE

Respondents respectfully adopt the succinct statement of the case set forth in the opinion of the Kansas Supreme Court in this case. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 5-9.

CERTIORARI CONSIDERATIONS

I. THIS COURT RECENTLY GRANTED REVIEW ON THE ISSUE OF WHETHER *CRAWFORD v. WASHINGTON* APPLIES RETROACTIVELY.

Petitioner maintains that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), created a watershed rule of criminal procedure and as a result should be applied retroactively to cases on collateral appeal. Pet. Br. 7-22. On May 15, 2006, this Court granted review on whether *Crawford* should be applied retroactively. *See Whorton v. Bockting*, 126 S. Ct. 2017 (2006). Petitioner acknowledges this fact in his petition. Pet. Br. 7.

The issue of *Crawford*'s retroactive application to cases on collateral review presented in *Bockting* is substantially similar to questions II and III in the petition for a writ of certiorari in this case. The sole difference between this case and *Bockting* is that this case arises from the Kansas Supreme Court's denial of state post-conviction relief under Kan. Stat. Ann. § 60-1507. Pet. App. 1-35.

Given the similarities, the Court should hold the petition in this case pending its decision in *Bockting* and dispose of this matter accordingly once a decision is reached in *Bockting*.

II. WHETHER KANSAS'S PERHAPS UNIQUE EXCEPTION FOR THE ADMISSION OF EVIDENCE OF MARITAL DISCORD VIOLATES THE SIXTH AMENDMENT DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioner contends that in the event that *Crawford v. Washington*, 541 U.S. 36 (2004), is not applied retroactively, the decision by the Kansas Supreme Court addressing the "marital discord" exception ran afoul of the Confrontation Clause of the Sixth Amendment. His argument is both procedurally and substantively flawed.

A. THE KANSAS SUPREME COURT'S DECISION RELIES ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND.

The Kansas Supreme Court's decision to deny petitioner relief on his Sixth Amendment challenge to the marital discord exception rested squarely on an independent and adequate state law ground. Pet. App. 31-35. The lower court did not engage in the constitutional analysis requested by petitioner, but rather determined that he forfeited his right to re-litigate the issue on grounds of *res judicata*. *Id.* The Kansas Supreme Court observed that petitioner "[did] not dispute that the issue of whether the hearsay was improper under [*Ohio v.*] *Roberts* was decided by the court on direct appeal," (Pet. App. 33), and was seeking only to have the matter revisited under the "law of the case" doctrine. *Id.* The reasonable conclusion is that the lower court believed that petitioner was simply displeased with its prior ruling (Pet. App. 58-63) and improperly sought to resubmit the claim in his post-conviction appeal.

Thus, petitioner's challenge to the marital discord exception was rejected on a state law ground that was independent of the federal question and adequate to support the state court's judgment. *See Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983); *Durley v. Mayo*, 351 U.S. 277, 284-85 (1956) (*res judicata* generally constitutes an adequate

and independent state ground). Indeed, the Kansas Supreme Court's decision is plain regarding its disposition of the Confrontation Clause issue on direct appeal, and why it would not revisit the issue on collateral review. Pet. App. 31-35. In short, the lower court's decision denying relief was not based on Sixth Amendment jurisprudence, but on state law procedural grounds. *Id.* Consequently, this Court is without jurisdiction to review the first question presented in the certiorari petition. *Dretke v. Haley*, 541 U.S. 386, 393 (2004).

Petitioner suggests that this Court should ignore the lower court's independent and adequate resolution of this claim "[b]ecause [he] could not possibly have raised the issue of the marital discord exception's constitutionality on direct appeal."[1] Pet. Br. 24. His failure to directly raise the federal claim did not, however, foreclose his ability to continue to litigate this particular issue. Indeed, despite petitioner's assertion that he did not argue the claim, the lower court did consider the present constitutional issue on direct appeal, directly invoking *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004) ("Hearsay statements made by a deceased spouse-declarant are admissible as evidence of marital discord if the trial court finds that the statements have particular guarantees of trustworthiness.") Pet. App. 58-63;

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[1] Petitioner further invites the Court to second guess the Kansas Supreme Court's decision to employ the doctrine of *res judicata* arguing, in essence, that it so fundamentally misconstrued state law in this area that the decision cannot be considered an adequate state law ruling. Pet. Br. 24-27. Only in the rarest of cases should this Court seek to review an alleged error of state law—and this case presents no such circumstance. *Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (errors of state law are not the concern of the Court unless such error for some other reason rises to the level of a denial of a constitutional right).

see also Illinois v. Gates, 462 U.S. 213, 218 n.1 (1984) (noting that federal law is sufficiently drawn into question if the federal question "had been either raised or squarely considered and resolved in state court"). The issue today was drawn into question by the lower court and appropriately postured following petitioner's direct appeal. To that end, petitioner had the opportunity to seek certiorari from that decision, yet he failed to do so.

Even if petitioner did not directly argue the precise federal question during his direct appeal that he now presents, the issue was passed upon to the degree that it was available for this Court's certiorari review.[2] Petitioner chose not to pursue this claim while it was ripe, opting to present anew his claim in state post-conviction proceedings—an attempt that the Kansas Supreme Court rejected on state law procedural grounds. Petitioner's failure to seek certiorari review following his direct appeal is noteworthy and alone makes this petition an inappropriate vehicle by which to consider the marital discord exception.

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[2] In his brief on direct appeal (Resp. App. 1a-12a), petitioner submitted that the trial court erred in admitting the challenged statements as *res gestae*, an issue of Kansas law. Although petitioner focused his attention on the issue of *res gestae*, he made explicit reference to the Confrontation Clause and how it was violated as a result of the trial court admitting testimony of various witnesses. (Resp. App. 10a-11a). Petitioner submits that he could not have raised a Confrontation Clause challenge to the marital discord exception on direct appeal, in turn arguing that the lower court's employment of *res judicata* was therefore inappropriate. Pet. Br. 24. Petitioner's argument is not well-founded and is simply a distinction without a difference. Petitioner did challenge the statements on Sixth Amendment grounds, and the lower court rejected that argument. (Pet. App. 33, 63). Petitioner's successive attempt at challenging these statements as a violation of the Confrontation Clause should also be rejected by this Court.

From a substantive perspective, the decision below was eminently sensible. Under Kansas law, a challenge to a criminal conviction based upon the alleged improper admission of trial testimony introduced in violation of the Confrontation Clause is expected to be raised on direct appeal. *See Bruner v. State*, 88 P.3d 214, 218 (Kan. 2004) (trial errors affecting constitutional rights must be raised on direct appeal unless exceptional circumstances exist excusing the failure to present claims at that stage). On direct appeal, petitioner challenged the admission of the statements by the health professionals and the Kansas Supreme Court rejected his arguments. The decision to deny petitioner relief on procedural grounds during the collateral appeal was therefore reasonable as the Confrontation Clause issue, analyzed under *Roberts* had been resolved previously.

In sum, this Court lacks the necessary jurisdiction to review the question of whether Kansas's marital discord exception violates the Confrontation Clause of the Sixth Amendment. Consequently, the petition for writ of certiorari should be denied.

B. WHETHER KANSAS'S MARITAL DISCORD EXCEPTION VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT DOES NOT MERIT THIS COURT'S ATTENTION.

Independent of petitioner's retroactivity claim, and notwithstanding that his first question presented is not properly before this Court, the argument that Kansas's marital discord exception violates the Confrontation Clause of the Sixth Amendment lacks sufficient merit to justify this Court's attention. Petitioner submits that this appeal warrants review on grounds that the lower court's opinion is in conflict with *Roberts*, 448 U.S. 56, *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999). Pet. Br. 6. That

suggestion falls short of establishing any meaningful reason why this Court should grant his petition.

A decision in this case has no future implications and would only apply to a fleeting number of *past* Kansas cases given the Court's decision in *Crawford*, which altered the Confrontation Clause analysis in the context of hearsay evidence rules. Absent *Crawford*, petitioner's appeal would simply represent an everyday complaint against a state court's evidentiary ruling. Such evidentiary matters are routinely left to the states unless an appeal presents an issue of much broader interest. The petition here does not implicate any federal constitutional concern beyond petitioner's own conviction and the convictions of a very limited number of individuals whose trials in Kansas may have involved the admission of evidence involving a discordant relationship.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the petition or, in the alternative, hold the petition for resolution following the Court's decision in *Whorton v. Bockting*, 126 S. Ct. 2017 (2006).

Respectfully submitted,

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